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Judges, Law, Politics & Strategy

Frank B. Cross

In law, we commonly presume that judges reach decisions based on legal materials, such as precedents. In political science, researchers typically presume that judges *do not* reach decisions based on such legal materials. They maintain that the apparent reliance on precedent to reach decisions is simply a hoax designed to provide cover for a particular outcome. These researchers traditionally argued that judges reach their personally preferred outcome in the case and then rationalize it after the fact with references to precedent, conveniently supplied them by the attorneys for their preferred side.

Much of the empirical research on judicial decision making has involved the United States Supreme Court. Indeed, there is considerable evidence that Supreme Court justices decide cases differently, for ideological reasons, and do not reliably defer to prior precedents of the Court. For structural reasons, though, the Supreme Court is not a representative sample to study the operation of the law. The Court selects its own cases, and very few of them. These are often the cases where the law does not provide a clear answer, so one cannot look for legal control. Moreover, in its position at the top of the judicial hierarchy, the Supreme Court has no vertically superior precedents it is legally bound to obey.

The lower courts are where the law is found in this nation. They issue vastly more decisions and the appellate courts are often the final arbiters of legal disputes, on the frequent occasions when the Supreme Court does not review their rulings. Political scientists and economists have considered the role of precedent in lower courts. Although loath to accept claims that judges follow precedent because they are supposed to do so, these researchers have argued that lower-court judges do indeed follow precedent, for strategic reasons.

STRATEGY THEORY OF PRECEDENT FOLLOWING

The basic premise of the strategic theory of following precedents is that lower-court judges do not reach their preferred outcomes in cases because of a fear of reversal by a higher court. They compromise their ideological preferences to avoid a reversal, which would of course undo those preferences. In addition, researchers hypothesize that there is some stigma associated with reversal such that judges will shun results that subject them to higher-court reversal.

At the federal-circuit-court level, this hypothesis has facial plausibility problems. The federal circuit courts decide tens of thousands of cases annually, while the Supreme Court now reviews fewer than one hundred cases. If judges are so devoted to their ideological preferences, it makes little sense for them to sacrifice those preferences across the board, when the probability of reversal is so extremely low.

The experience of the Ninth Circuit Court of Appeals illustrates this effect. In 1997, the Supreme Court took 29 cases from the Ninth Circuit and reversed 96% of them, which probably represents a record for the disciplining of a particular circuit

court. Yet the Ninth Circuit decided around eight thousand cases a year, and the Supreme Court let stand 99.7% of the circuit's 1997 decisions. Thus, the circuit had little incentive to modify its decisions to avoid reversal and in fact it did not do so. The Ninth Circuit continued to have a high reversal rate at the Court, typically rendering relatively liberal decisions, a few of which were reversed but most of which stood unreviewed.

Researchers have come up with some clever theories of random auditing that enable the Supreme Court to have influence beyond the few cases it takes. But none of these theories enable a Court deciding so few cases to exercise control over the vast body of circuit court decision making. Moreover, these strategic theories do not truly explain adherence to precedent – they try to explain adherence to contemporaneous Supreme Court preferences. Under the theories, there is little reason for a circuit court to follow a Warren Court precedent, when such an outcome may not be favored by the present makeup of the Supreme Court.

This adherence to current Supreme Court preferences is sometimes called “anticipatory overruling.” This occurs when a lower court believes that the Supreme Court wishes to disregard a past precedent of the Court, and the lower court therefore disregards that precedent in expectation of affirmance. An oft-cited instance of this action is the Fifth Circuit's decision in *Hopwood v. Texas*, which essentially concluded that the *Bakke* decision on affirmative action was no longer the Supreme Court's preference. While one can identify instances of apparent anticipatory overruling, they do not seem frequent. And anticipatory overruling is not adherence to precedent.

ALTERNATIVE THEORY OF PRECEDENT FOLLOWING

The conventional legal theory of precedent following is one of traditional Langdellian formalism. Judges decide cases according to the best application of precedents (and other legal sources such as the Constitution and statutes) to the facts at hand. This traditional theory turns judges into ciphers, acting as “law calculators” to decide cases without individuality personality or preferences. Few scholars in the law or other disciplines believe that judges act in this manner. Indeed, few judges claim to act in this manner. There is ample empirical evidence showing that different judges will reach different decisions in the same case and that this difference can be explained by their apparent ideological preferences. However, the empirical evidence falls far short of demonstrating that individual judicial ideology explains all or even most decisions. The following theory attempts to salvage a kernel of the conventional formalistic theory of judicial decision making, and combine it with judicial ideology.

I begin by suggesting that judges have a preference for following the law. In the language of an economist, judges get utility from adhering to precedent, perhaps because it is considered part of their judicial responsibility. This is not to suggest that judges are either saints or machines who slavishly follow their duty at the expense of all personal predilections. Rather, I sug-

gest only that judges take law adherence seriously enough that it forms part of their decision-making consideration. Richard Posner has suggested an interesting analogy of judging to playing a game. Legal decision making is a rule. Just as a chess player would get little utility from winning a match by cheating on the rules, Posner suggests that a judge would get little utility from reaching a desired outcome by cheating on the law. For my purposes, it is unimportant to identify the reason that judges prefer law or precedent adherence, simply that they do have this preference.

At this point, it is necessary to turn to what it means to follow precedent, which requires a digression into linguistic theory. Those who believe that the law is all political, such as critical legal theorists, argue simply that language is too ambiguous to constrain judges. In the hands of a skilled interpreter, words can be colorably twisted to mean anything. The “Crits” argued that language was radically indeterminate, so that any word could be manipulated to mean anything. This theory of radical indeterminacy has been generally rejected as implausible, but that does not deny the presence of some indeterminacy in language.

Philosophers have devoted much time to exploring the study of language, commonly called hermeneutics. Gadamer is perhaps the leading philosopher in the field and he emphasized the inevitable indeterminacy of language. He stressed that the interpretation of a given text is influenced by the interpreter and his or her own history and context. However, he also noted that there were interpretive communities of individuals with roughly similar histories and contexts who would interpret the same language with great commonality. This latter position suggests that the judiciary might be expected to reach similar interpretations of the same precedent.

There remains the problem of some linguistic indeterminacy, however. A common American interpretive community would not look at the color red and declare it to be blue. Words about colors are not so radically indeterminate. However, consider when that community is presented with a color such as aquamarine or some other intermediate shade. Some interpreters might call this color blue, while others would disagree. The word for the color blue thus has some determinacy and rules out various shades but is not perfectly determinate, defining all the same shades into the set for every individual. Language has an unavoidable fuzziness.

Precedents share this fuzziness of meaning. The words of the precedent have their own uncertain meaning, especially when composed of very broad terms such as “due process.” Moreover, the precedential case was resolved in a particular dispute with particular underlying facts. While it may discuss the importance of various facts to its ruling, the precedent cannot possibly discuss the relevance of every conceivable fact that might subsequently arise. In a later case, with different facts, a judge might reasonably find that the earlier precedent should be distinguished, given the factual differences.

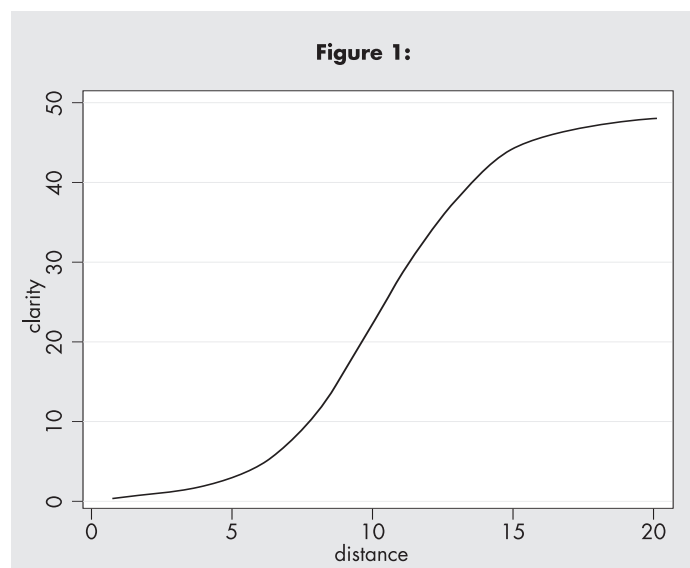
To better understand this fuzziness, one can turn to the science of categorical perception. Much of this science has examined the perception of sounds. For example, the sounds for the letters “b” and “p” are distinct but have an intermediary continuum. A sound can depart from the “ideal b” sound and still be perceived as a “b.” At some point, though, the departure

becomes too great, and the sound is no longer perceived as a “b” but perhaps instead as a “p.” This produces an association that studies of categorical speech perception have characterized as “S-shaped.” This association is depicted below in Figure 1. The analogy to precedent is straightforward. The precedent sets an ideal point for future decisions, but a court may depart somewhat from that ideal point and still be perceived as consistent with precedent. However, once the departure from the ideal point becomes too great, it is no longer perceived as consistent with adherence to precedent. The implications of this association are depicted in the following three figures.

To begin my depiction of the theory of precedent-following, the relevant considerations must be reduced to some quantitative scale, which seems somewhat artificial. However, it is not important that the precise quantification be accurate, so long as the relationships are roughly accurate. Figure 1 is meant to depict the nature of language interpretation as an S-shaped curve. Suppose the best understanding or intended meaning of a precedent is at the far right end of the figure, at the point labeled 20. The horizontal axis is a measure of the distance of a decision from this point 20 and the vertical axis is a measure of how linguistically clear it is that the decision is in fact distant from point 20.

S-CURVE OF LANGUAGE AND PRECEDENT

In this figure, a decision at point 20 is perfectly compliant with precedent, but its linguistic fuzziness means that a decision at point 15 appears to be quite compliant with precedent. However, once one gets much further removed from point 20, the noncompliance with precedent becomes quite clear. At points 5 or 10, it is relatively obvious to the decider that he or she is departing from precedent. If a judge perceives that the intended point of precedent is at 20, he or she would render an opinion based on this perception, and this would represent a



classic legal formalism. However, given the fuzziness of language, a judge might misperceive the precise location of precedent and believe that it was set at point 15.

Next I consider the problem that arises when a judge does not like the outcome dictated by precedent – the issue of interest to researchers of judicial decision making. If a judge ideo-

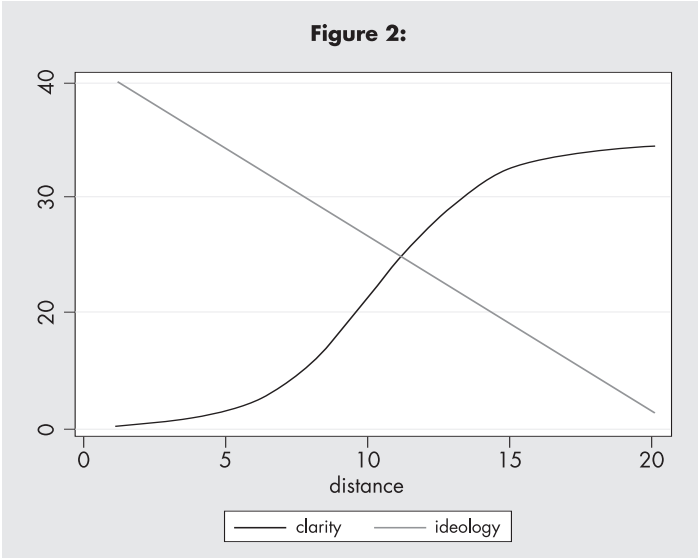
logically agrees with the precedent, one would expect the judge to happily follow it, but this does not display any power of precedent, because the judge would have reached that decision absent precedent. For adherence to precedent to have meaning, it must influence decisions away from those the judge would otherwise prefer to reach.

Figure 2 displays the conflict. Again, we have a precedent set at point 20 but now the deciding judge's ideology lies at point 0, some distance from the precedent. I assume that the more ideologically distant the decision is from the judge's ideology, the less preferred it is. This is depicted by the straight line in Figure 2, which steadily declines as it gets further from 0. This is superimposed on the S-shaped curve of precedent following in Figure 1.

IDEOLOGY IN CONFLICT WITH PRECEDENT

Note that for purposes of this figure, I have assumed that ideology is more important to the judge than is legal-precedent following. The ideological line peaks at point 60, while precedent following gets no higher than point 50. Thus, if given the choice, the judge would prefer to decide ideologically at point 0 than legally at point 20, because 60 > 50.

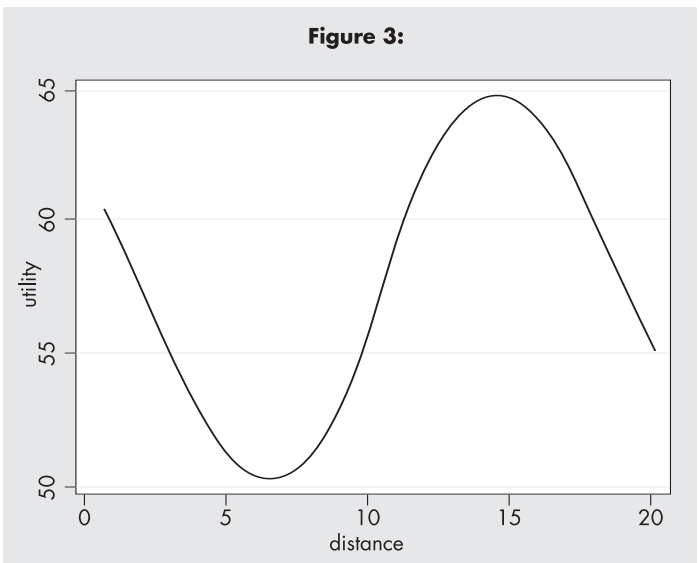
However, this outcome does not follow if one assumes that a judge gets utility from both ideology and law adherence. Thus,



at each point on our distance scale, the judge gets the vertical ideology measure for consistency with ideology and the vertical legal measure for consistency with the law and precedent. Figure 3 displays the results from adding the two measures together from Figure 2. The horizontal axis is again a measure of distance (from precedent and preferred ideology), and the vertical axis is a measure of judicial utility from adding up the legal and ideological measures.

CUMULATIVE IDEOLOGICAL/LEGAL UTILITY

Based on my assumptions, the lower-court judge gains the greatest cumulative ideological/legal utility by deciding the case at around point 15. This provides “pretty good” adherence to precedent (at point 20), allowing some influence from the judge’s personal ideological preferences. This pretty good adherence to precedent occurs even though the individual judge in my hypo-



thetical model places greater relative importance on ideology than adherence to precedent.

In this theory, the closeness of future adherence to precedent may depend on the specificity of that precedent. My S-shaped curve may have different dimensions, with a larger or smaller upper plateau, depending on the clarity of the precedential command. Some precedents, which provide more detailed specificity, may have a smaller upper plateau of linguistic indeterminacy, and they should therefore command a greater degree of adherence from lower courts. However, the effort to produce too much precision could result in inflexible rules that will be disregarded or too easily distinguished away in future decisions.

The judicial ideological influence need not be a conscious one. Psychologists have consistently identified a feature of human nature called motivated reasoning. In this process, individuals analyze available information conditioned on their beliefs. They are more likely to believe information that would support their desired conclusion and disbelieve information inconsistent with that result. Although a judge may be dedicated to producing an opinion that would convince even a dispassionate observer, the factual and legal sources of a decision are filtered through the judge’s preexisting preferences, which influence the outcome.

EMPIRICAL STUDY OF CIRCUIT-COURT DECISIONS

I believe my hypothesis, that judges gain utility from both ideologically consistent decisions and from law adherence is a plausible one, and it is supported by various surveys of circuit-court judges that have been conducted over the years. Like any hypothesis, though, it must be tested for predictive accuracy. Such empirical testing of judicial decision making is imprecise. In contrast to traditional economics, with readily available quantitative measures for GDP and other variables, there are no obvious quantifications for ideology or adherence to precedent.

Most empirical research on judicial decision making has been conducted by political scientists and focused on the role of ideology in decisions, so I use their basic frame and available data. As noted above, the Supreme Court has been extensively studied and justices have been given quantifiable scores for ideology, and research has shown that their decisions conform reasonably well

to those ideological scores. Thus, we have reasonably reliable measures of Court ideological preferences. To provide ideological measures for circuit court judges, I assume that their preferences conform to those of their appointing President (as measured by their ADA ratings). These provide us with measures of ideological preference for the judges.

Providing ideological measures for decisions is even more difficult. There are no grounds for saying that a particular opinion is located at a particular ideological point on our scale (0-20 in the figures). Researchers typically classify these decisions on a binary scale, as either liberal or conservative and have developed rules for this classification. For example, if a decision strikes down an anti-abortion law as unconstitutional, it would be coded as liberal while if it upholds that law it would be coded as conservative. Obviously, the available measures for judicial ideology and decision ideology are only very rough ones. This imprecise specification, though, generally has the statistical effect of obscuring a true association. If an association appears, despite the limitations of the measures, that provides especially strong evidence of its reliability.

To conduct the study, I use the already accepted measures of ideology for the Supreme Court and for circuit court judges. I study decisions using a vast database of thousands of federal circuit court decisions over the years, compiled thanks to a National Science Foundation grant. This database codes the decisions on numerous dimensions, including whether they reach a liberal or conservative outcome.

My study considers the likelihood that a given judge will issue a liberal (or conservative) decision. I have three essential variables to test. The first variable is judicial ideology, measured by the presidential appointment ADA rating discussed above. If this variable is statistically significant, it would show that judicial ideology matters. The second variable is the contemporaneous ideological position of the median Supreme Court justice. This is the “swing voter” on the Court, whose preferences are likely to dictate the outcome of close cases. If this variable is statistically significant, it would provide some evidence of anticipatory overruling, that circuit judges are strategically adapting their decision to the contemporaneous preferences of the Court. However, the contemporaneous preferences of the Court may also reflect the past preferences of the Courts, and hence the content of their decisions and precedents issues. If so, the association might truly reveal adherence to precedent. To control for this effect, I add a third variable for the Supreme Court’s median voter for the prior five years, to reflect the ideological content of recent precedents. If this variable is significant, after controlling for the preferences of the contemporaneous Court, it would suggest that precedent is indeed driving the outcome of circuit court decisions.

I used a procedure known as logistic regression to test the effect of these variables on decisions. There are 20,744 separate votes by circuit court judges in the database, for which all the necessary variable measurements are available. Because some of these cases have relatively little ideological content, I also ran the regression for two subsets of cases. One subset is criminal cases, where a vote for the defendant is considered liberal, for which there were 7,206 judicial votes to be studied. The second subset is civil-rights cases, where a vote for the party representing a minority is considered liberal, for which there were 2,419 judi-

cial votes to be considered. Table 1 reports the results of the regression for each set of cases.

All results were highly statistically significant at the .01 level, for each group of cases. The significant finding was that *Ideology* and *Past Supreme Court Median* were positive, but the current *Supreme Court Median* was actually negative. This is strong evidence against the anticipatory overruling theory but supports the

TABLE 1: LOGIT REGRESSION ON OUTCOME OF CIRCUIT COURT DECISIONS			
	ALL CASES	CRIMINAL CASES	CIVIL-RIGHTS CASES
IDEOLOGY	.05	.05	.07
SUPREME COURT MEDIAN	-.50	-.46	-2.0
PAST SUPREME COURT MEDIAN	.61	.55	1.0

theses that both judicial ideology and precedent are important determinants of the votes of circuit court judges. In a logit regression the size of the number (the coefficient) cannot be directly compared among variables, which also have different scales. Thus, the statistical significance of the findings does not demonstrate the substantive significance of the effect of each of these variables.

The substantive significance of our variables can be measured in a different approach. For this, I considered the effect of moving from the 25th percentile on each scale to the 75th percentile. For example, with *Ideology*, I considered the effect on decisions of moving from the 25th percentile (a relatively conservative judge) to the 75th percentile (a relatively liberal judge). Table 2 displays the effect of this change on the overall votes in the model.

These results mean that a shift from a relatively conservative judge to a relatively liberal judge means that the judge’s vote will be 6.9% more likely to be a liberal one. Both ideology and precedent show an effect. This also enables some comparison of

TABLE 2: SUBSTANTIVE EFFECT SIZES	
	25% → 75%
IDEOLOGY	6.9%
SUPREME COURT MEDIAN	-5.7%
PAST SUPREME COURT MEDIAN	7.4%

effects and indicate that precedent is slightly more significant. The effect sizes are not that great, but this is to be expected, because the case facts are important and cannot be incorporated in the model. In addition, the sizes may be moderated by the inability to provide precise specifications for the variables of ideology and precedent. I suspect that this problem causes a par-

ticular understatement of the precedent variable (because it considers only recent Supreme Court decisions and does not consider other precedents, such as those of the circuit court itself). Moreover, it does not consider other legal factors, such as statutes.

CONCLUSION

Judging, like any human decision making, is a complex process. The efforts of researchers to reduce this process to models is necessarily simplifying and fails to capture the full scope of the decision-making process. However, those models can illuminate key aspects of the process. There is neither sound theoretical reason nor empirical evidence to support contentions that judges engage in much strategic anticipatory overruling. Instead, it appears that judges generally adhere to precedent, albeit with some differences depending upon their personal ideological preferences. The results are consistent with

my hypothesis about the S-shaped curve of adherence to precedent in judicial decision making. The law and precedent do not rigidly bind subsequent judicial decisions, but they do tether them. Judicial discretion, an inevitable consequence of some linguistic indeterminacy, enables small departures from governing precedent, but dramatic disregard of precedent appears to be rare.



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